

The Adviser



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Impartiality and conflict of interest are the subject matter of Rule 5 of the Rules of Professional Conduct. The Advisory Service regularly advises against acting for more than one party. The Bar Admission Course Risk Management materials contain the following caution:-

"Conflict of interest - it may look easy, friendly and harmless (and the parties will assure you that it is), but if something goes wrong, especially if one party suffers some later financial loss, you can be sure to hear of all kinds of complex advice that you should have provided. In the Courts, there is a presumption of liability where conflict appears."

When faced with a potential conflict of interest situation carefully review the Rule and its commentaries. The solicitor who is satisfied with compliance of the Rule and is prepared to proceed on behalf of more than one party is advised to send a letter to the clients paraphrasing the main points of Commentary 4 of Rule 5 as follows:-

1. fully inform each party that the solicitor is acting for the other party to the transaction;
2. advise each party that no information received can be treated as confidential insofar as the other party is concerned;
3. advise each party that if a conflict develops, the solicitor cannot continue to act for both and may have to withdraw completely, and;
4. if one of the parties is a long standing client, that the solicitor has advised the other party of this and has recommended independent legal representation.

The solicitor should receive either the written consent of the clients or record their consent in a separate letter to each.

The 1985 case of Flynn Development Ltd. et al v. Central Trust Co. 51 O.R. (2d) 57 involved a situation where a solicitor had acted for both the mortgagor and the mortgagee in preparing and registering a mortgage of a shopping centre. The mortgage went into default, litigation arose between the parties, and the action was commenced to restrain the solicitor from acting in the litigation for the mortgagor. The action was successful. As Mr. Justice Montgomery stated in MTS International Services Inc. v. Warnot Corp. Ltd. (1980), 31 O.R. (2d) 221 at 222 "Parties to a concluded lawsuit should feel that they have been fairly dealt with. How can they have confidence in a just result when their former solicitor acts for the other side in a matter where he advised both parties?"

To reduce the risk of claims that result from a lawyer being in a conflict situation, a conflicts control system is necessary. The cornerstone is an index of clients and opposing parties. The index should be part of the file opening routine and kept up daily. One lawyer in the office should be given responsibility for supervising the system.

An alphabetic card index of clients and a separate index of opposing parties may suffice. Each card should identify the file involved, the date the file was opened (and closed) and the nature of the matter. Where corporations are parties, it might be useful to list on individual cards the directors, officers and major shareholders of the client or opposing party. Practitioners using computers should consider conflict control software programs now available.

It is not only large law firms that must be conscious of conflict risks. Small firms in small communities are always at great risk of providing advice, or proceeding inadvertently, against the interest of a former client.

Recent audit statistics show that ten percent of lawyers do not comply with the disclosure and consent requirements of Rule 5 of the Rules of Professional Conduct. The Law Society receives many complaints on alleged conflicts. In most cases, the lawyers involved cannot demonstrate that they met Rule 5 requirements in writing. Not all of the complaints are well founded, but the lawyers who cannot demonstrate compliance will have a difficult time establishing that the clients do not have a valid position.

Lawyers also have to look out for the "unsuspected client". A typical scenario is that Smith, Brown and Jones meet with Smith's lawyer to discuss a business venture agreement. Smith's lawyer believes he or she is acting only for Smith. Brown and Jones believe the lawyer is acting for everyone. The lawyer does not clarify the relationship and put it in writing. The business venture goes sour, Brown and Smith lose money, they complain that the lawyer failed to protect their interests (they now deem themselves to have been clients from the first meeting). Under Rule 5 (paragraph 13 of the commentary) the lawyer may find himself or herself with "unsuspected clients", legal problems and disciplinary problems. In similar circumstances, we advise that you make it clear to all parties, in writing, who is your client, that you are not acting for the other parties, and carefully avoid placing yourself in a solicitor-client relationship with the other parties.

Use Rule 5 and the messages we are receiving from recent case law to protect yourself from these all too frequent problems.